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No. 94-805, 94-806, and 94-988

In the
Supreme Court of the United States
October Term, 1995

GEORGE W. BUSH, Governor of Texas, et al.,
Appellant-Applicants,
v.
AL VERA, et al.,
Appellee-Respondents.
REV. WILLIAM LAWSON, et al., and ROBERT REYES, et al.,
Appellants,
v.
AL VERA, et al.,
Appellees
UNITED STATES OF AMERICA
Appellants,
v.
AL VERA, *et al.*
Appellees.

On Appeal from the United States District Court
for the Southern District of Texas

BRIEF AMICUS CURIAE OF PACIFIC LEGAL FOUNDATION IN SUPPORT OF APPELLEES, AL VERA, ET AL.

IDENTITY AND INTEREST OF AMICUS CURIAE

Pursuant to Supreme Court Rule 37, Pacific Legal Foundation (PLF) respectfully submits this brief amicus curiae in support of appellees, Al Vera, *et al.* All parties

have consented to the filing of this brief. The letters of consent have been lodged with the Clerk of this Court.

Pacific Legal Foundation is a nonprofit, tax-exempt corporation organized under the laws of the State of California for the purpose of engaging in litigation in matters affecting the public interest. Policy is set by a Board of Trustees composed of concerned citizens, the majority of whom are attorneys. PLF's Board evaluates the merits of any contemplated legal action and authorizes such legal action only where the Foundation's position has broad support within the general community. PLF's Board has authorized the filing of an amicus curiae brief in this matter.

Pacific Legal Foundation is submitting this brief because it believes its public policy perspective and litigation experience in the voting rights arena will provide an additional viewpoint with respect to the issues presented. PLF attorneys have participated in numerous other cases in the voting rights context before this Court including *Shaw v. Hunt*, Supreme Court Docket Nos. 94-923, 94-924; *Hays v. Louisiana*, 515 U.S. ___, 132 L. Ed. 2d 635 (1995); *Chisom v. Roemer*, 501 U.S. 380 (1991); and *League of United Latin American Citizens v. Attorney General of Texas*, 501 U.S. 419 (1991).

PLF believes that racial classifications by government, both in the voting rights context and otherwise, should be inherently suspect and, absent extraordinary circumstances, unconstitutional. This standard is particularly applicable when congressional districts are gerrymandered on the basis of race. PLF further believes that "incumbency protection," far from being a compelling interest to justify racial gerrymandering, is actually destructive of American democracy.

OPINION BELOW

The opinion of the three-judge District Court finding three of Texas' congressional districts to be unconstitutional as a violation of the Equal Protection Clause is reported at *Vera v. Richards*, 861 F. Supp. 1304 (S.D. Tex. 1994).

STATEMENT OF THE CASE

After the 1990 census, the State of Texas redrew its congressional districts. *See* Tex. Const. Art. III, § 26. The boundaries were drawn with knowledge of the ethnicity of every voter in the state and were drawn to channel individuals of like ethnicity into particular districts by reason of that immutable trait. *Vera v. Richards*, 861 F. Supp. at 1309. The Attorney General of the United States precleared the redistricting plan under Section 5 of the Voting Rights Act but expressed reservations as to its constitutionality. *Id.* Six Texas voters, residing in Congressional Districts 18, 25, 29, and 30, challenged 24 of the state's 30 districts as racially gerrymandered. *Id.*

The District Court struck down Districts 18, 29, and 30 as racially gerrymandered, holding that when the state redraws those districts, it "can and must exhibit respect for neighborhoods, communities, and political subdivision lines." *Id.* at 1310. The other districts were upheld because they were "disfigured less to favor or disadvantage one race or ethnic group than to promote the reelection of incumbents." *Id.* at 1309.

SUMMARY OF ARGUMENT

Racial classifications, inherently problematic, violate the Fourteenth Amendment of the United States Constitution unless they are narrowly tailored to further a compelling governmental interest. Racial classifications tied to suffrage

are not excepted from this standard. To the contrary, where both a suspect classification and a fundamental right are involved this strict scrutiny standard is most important. The court below correctly subjected the boundary lines of Texas Congressional Districts 18, 29, and 30 to strict scrutiny and found them lacking.

Historically, American political thought emphasized equality of opportunity, "moral equality," over equality of results, "numerical equality." From the founding of our Nation through the Civil War to the enactment of the landmark civil rights legislation in the 1960s, both government and citizen activists agreed that moral equality was the basis for a strong, nondiscriminatory republic. For the past 25 years, however, numerical equality has superseded moral equality as the foundation for governmental decisionmaking. This ascendance of numerical equality is contrary to the premises on which America achieved its distinctive greatness.

Moreover, while most jurisdictions go to great lengths to hide the partisan nature of their districting, Texas proclaims it proudly. When a legislature seeks to guaranty incumbency, whether through racial or other classification, the goal of representative government is defeated. In the American political tradition, the intent to gain power by some method other than appealing to voters is just plain wrong. When such gerrymandering has the effect of segregating Americans by race, it violates the Constitution.

ARGUMENT

I

RACIAL GERRYMANDERING IS NEVER CONSTITUTIONAL

Texas' "Congressional Districts 18, 29, and 30 were created for the purpose of enhancing the opportunity of minority voters to elect minority representatives to Congress." *Vera*, 861 F. Supp. at 1337. Whatever may be the justification for racial classifications in other situations (*e.g.*, remedial mechanisms in contracting and employment), the Fourteenth Amendment forbids government institutions from redistricting based on race and ethnicity. Despite its insistence that the lines were drawn to protect incumbents by divvying up Democrats (see *infra* at 16-26), the fact of Texas' reliance on race as the sole defining characteristic related to party membership is established by the use of the computer which drew the district lines: no other socio-economic census data existed on the computer or was made available to the Legislature. *Vera*, 861 F. Supp. at 1336. To put it in the familiar nomenclature of the Court, racial gerrymandering can never survive strict scrutiny because there is no compelling justification for redistricting on racial lines.

The Fourteenth Amendment to our Constitution embodies the fundamental principle of "moral equality." Moral equality requires that government and society consider every person as an individual, not as a fungible member of some racial or ethnic group. Moral equality forbids government from handicapping individuals for arbitrary or discriminatory reasons. It has been alternatively described as "equality of opportunity," especially when contrasted with numerical equality, or "equality of results." T. Eastland and W. Bennett, *Counting by Race: Equality from the Founding Fathers to Bakke and Weber* 9-10 (Basic Books, Inc., N.Y., 1979) (Eastland); *see also* T. Sowell, *A Conflict of Visions:*

Ideological Origins of Political Struggles 121-40 (William Morrow & Co., N.Y., 1987).

America was founded on the basis of moral equality, as it is so eloquently phrased in the Declaration of Independence: "We hold these truths to be self-evident, that all men are created equal, that they are endowed by their creator with certain unalienable rights, that among these are life, liberty, and the pursuit of happiness." The institution of slavery existed at the time of the Declaration and was hopelessly inconsistent with it. For nearly a century, this incompatibility provoked bitter political debate, culminating with Abraham Lincoln declaring an end to slavery in 1863 and the triumph of the Union in 1865. The Fourteenth Amendment enshrined the victorious concept of moral equality after the Civil War and this concept was still the norm through the enactment of the Civil Rights Act of 1964 and the Voting Rights Act of 1965. Only within the last 25 years has devotion to numerical equality threatened to subsume moral equality as the basis for American politics.

A. Historical Basis for Moral Equality

Moral equality was central to the philosophical principles which inspired the founding of the American republic. In John Locke's Second Treatise, the philosopher argued that "all men are naturally in ... a state of perfect freedom to order their actions and dispose of their possessions and persons as they think fit, within the bounds of the law of nature, without asking leave or depending upon the will of any other man." J. Locke, *Two Treatises of Government* 121 (T. Cook ed., 1947), *cited in* H. Jaffa, *How to Think About the American Revolution: A Bicentennial Celebration* 40 (Durham, N.C., 1978) (Jaffa). This concept of natural freedom and equality provided that the just powers of government in the American political tradition could only be derived from the consent of the governed. Because the right of consent is itself derived from the equality of all

humans, consent is limited--one may not consent to that which denies the premise of equality. Jaffa at 40-42; *see also The Federalist No. 51* (J. Madison) (Rossiter ed., 1961) at 322. A government of men over men, rather than of angels over men, or of men over beasts, presumes the moral equality of the men who govern, not only among themselves but also with the governed. Thus, the very nature of the problem that the Constitution was written to resolve is determined by the meaning of equality. Jaffa at 42.

British political scientist Joel Barlow wrote in 1792 that the American notion of moral equality precipitated the Revolution and sustained American freedom. In the United States, the word "people" meant the whole community and comprehended every human being in the society. There were only "individuals" in America; there could be nothing else--no feudal system, no lords, no monarchs. Rather, Americans revered only those distinctions which nature created--a diversity of talents, abilities, and virtues. J. Barlow, *Advice to the Privileged Orders in the Several States of Europe Resulting from the Necessity and Propriety of a General Revolution in the Principles of Government* 17 (Ithaca, N.Y., 1956, first published London, 1792), *cited in* G. Wood, *Creation of the American Republic, 1776-1789* 607 (University of North Carolina Press, 1969). The obvious conflict between moral equality and the institution of slavery was not fully resolved in American political and legal thought until Abraham Lincoln began the process of ending slavery in America with the Emancipation Proclamation on January 1, 1863 (*reprinted in* H. Commager, *Documents of American History*, Vol. 1, 420-21 (9th ed. 1973) (Commager)), and the states ratified the Thirteenth Amendment to the United States Constitution on December 6, 1865, forever outlawing that despicable practice.

Lincoln's importance to the development of the concept of moral equality cannot be underestimated. To him,

the principle of equality was logically necessary to the idea of self-government. *Lincoln's First Inaugural Address* (March 4, 1861), *reprinted in* Commager at 386-88. Self-government, by definition, requires the assumption that all humans possess free will and that all are morally autonomous. In this sense, all individuals are created equal and for one person to deal with another, because of race, in ways that deny or diminish the other's intrinsic worth as a moral agent is to deny the very basis upon which self-government is possible. Eastland at 55-56.

In his message to Congress on July 4, 1861, Lincoln defined the cause of the Union as the preservation of "that form, and substance of government, whose leading object is, to elevate men--to lift artificial weights from all shoulders--to clear the paths of laudable pursuit for all--to afford all, an unfettered start, and a fair chance, in the race of life." 4 *The Collected Works of Abraham Lincoln* 438 (R. Basler ed., 1953), *cited in* Jaffa at 34. Thus, republican government, in Lincoln's view, necessitated the elimination of slavery because it was incompatible with the principle of moral equality. Lincoln believed that this principle was higher than any other: It defined republican government. Eastland at 47.

The passage of the Civil War Amendments in 1865-1870 highlighted the primacy of moral equality. These Amendments spoke only of individuals, not groups:

> [E]quality is an individual attribute that had no connection with class or race; the [Fourteenth] [A]mendment extended the same rights to all--there could be no need to mention race or colour. ... Equality could not be divided into sections as happened to suit the demands of one or another class or interest group at any particular time.

Pole at 180-81. This moral equality of the individual, espoused by President Lincoln, led to the judicial concept of a color-blind Constitution:

> [I]n view of the Constitution, in the eye of the law, there is in this country no superior, dominant, ruling class of citizens. There is no caste here. Our Constitution is color-blind, and neither knows nor tolerates classes among citizens. In respect of civil rights, all citizens are equal before the law. The humblest is the peer of the most powerful. The law regards man as man, and takes no account of his surroundings or of his color when his civil rights as guaranteed by the supreme law of the land are involved.

Plessy v. Ferguson, 163 U.S. 537, 559 (1896) (Harlan, J., dissenting). Sadly, the moral equality and constitutional protection of the individual under a color-blind Constitution was corrupted by the doctrine of "separate but equal," an invidious concept that haunted America for more than a half-century.

On May 17, 1954, the Court once and for all declared "that all men are created equal," and that our Constitution would stand for nothing less. "Separate" is "inherently unequal." *Brown v. Board of Education*, 347 U.S. 483, 495 (1954). The Court's opinion would provide the legal foundation for Dr. Martin Luther King's "dream"--that his children would "live in a nation where they will not be judged by the color of their skin but by the content of their character." A. Kull, *A Color Blind Constitution* 166 (Harvard University Press, 1992). Moral equality, fundamental democratic principles, and the Constitution were restored as the supreme law of the land.

How, then, have states been not only allowed but *required* to segregate congressional districts? Some general

observations can be accurately made: The pursuit of numerical, rather than moral, equality unfortunately has been embraced by virtually all institutions of government and some public opinion. *See* A. Bickel, THE MORALITY OF CONSENT 133 (Yale Univ. Press 1975). The most disturbing aspect of this shift in political thought is the disavowal of individual rights in favor of a collective group rights concept of equality. All blacks are held to be victims of discrimination and hence entitled to compensation. All whites are held to have benefited unjustly from the system of racial discrimination and are guilty. These assumptions stand in fundamental opposition to the universal principle of individual rights that has been the moral and intellectual foundation of the American republic.[1] *See* H. Belz, *Equal Protection and Affirmative Action, The Bill of Rights in Modern America* 173 (Bodenhamer & Ely, eds., Indiana University Press, 1993) (Belz).

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[1] The Court's constant recognition of fundamental rights as individual rights is so oft-stated that only a few examples will suffice to make the point here. In *Arizona Governing Committee for Tax Deferred Annuity and Deferred Compensation Plans v. Norris*, 463 U.S. 1073, 1083 (1983), this Court explicitly held that the Constitution must treat citizens as *individuals*, not "'as simply components of a racial, religious, sexual, or national class.'" Moreover, in *Griswold v. Connecticut*, 381 U.S. 479 (1965), *Eisenstadt v. Baird*, 405 U.S. 438 (1972), and *Roe v. Wade*, 410 U.S. 113 (1973), the Court identified in the Due Process Clause of the Fourteenth Amendment a fundamental *individual* right to decide whether or not to beget or bear a child. *Carey v. Population Services International*, 431 U.S. 678, 688-89 (1977).

B. Racial Gerrymandering Violates the Holding of Brown v. Board of Education and the Concept of Moral Equality

By allowing states to racially gerrymander their electoral districts, the despicable doctrine of "separate but equal," under the guise of "separate but better off," *Wright v. Rockefeller*, 376 U.S. 52, 62 (1964) (Douglas, J., dissenting), or "separate but proportional," Belz at 162, is restored under the sanction of law. In 1964, Justice Douglas asserted that there could be no legal distinction between segregation in voting and segregation elsewhere.

> I had assumed that since *Brown v. Board of Education* ... no State may segregate people by race *in the public areas*. The design of voting districts involves one important *public area*--as important as schools, parks, and courtrooms. We should uproot all vestiges of *Plessy v. Ferguson* ... from *the public area*.
>
> ... "Separate but equal" and "separate but better off" have no more place in voting districts than they have in schools, parks, railroad terminals, or any other facility serving the public.

Wright, 376 U.S. at 62, 67 (Douglas, J., dissenting) (internal citations omitted; emphasis in original); *see also Miller v. Johnson*, 515 U.S. ___, 132 L. Ed. 2d 762, 776 (1995). To allow states to be anything but race-neutral in the drawing of electoral districts is to deny moral equality and repudiate *Brown*.

First, racial segregation in redistricting is a per se violation of the Fourteenth and Fifteenth Amendments to the Constitution. The Fifteenth Amendment is an "exemption from discrimination in the exercise of the elective franchise on account of race, color or previous condition of servitude."

United States v. Reese, 92 U.S. 214, 218 (1876). There are no codicils or clauses in this Amendment with respect to a particular race--it is wholly color-blind and forbids *all* discrimination in voting, not merely discrimination that social engineers anoint as "invidious." Similarly, the Fourteenth Amendment forbids racial discrimination in regards to democratic elections: "Its central mandate is racial neutrality in governmental decisionmaking." *Miller*, 132 L. Ed. 2d at 771. In *Wright*, Justice Goldberg faithfully united the moral equality of *Brown*, the Fourteenth Amendment, and the harm of racial gerrymandering: "Given this settled principle that state-sanctioned racial segregation is unconstitutional per se," he wrote, "the Court's decisions since Brown v Board of Education [have held] that harm to the Nation as a whole and to whites and Negroes alike inheres in segregation. The Fourteenth Amendment commands equality, and racial segregation by law is inequality." *Wright*, 376 U.S. at 69 (Goldberg, J., dissenting). Although racial discrimination unrelated to elections (*i.e.*, "affirmative action" in limited, remedial circumstances) has been allowed by this Court to stand in the past, "[o]ur Constitution has a special thrust when it comes to voting," as emphasized by the Fifteenth Amendment. *Whitcomb v. Chavis*, 403 U.S. 124, 180 (1971) (Douglas, J., dissenting in part and concurring in part). Racial gerrymandering cannot be justified in light of the dictates of the Fourteenth and Fifteenth Amendments and the moral equality of *Brown*.

Second, segregating individuals by skin color into racial districts is little better than racial apartheid or caste systems: "A reapportionment plan that includes in one district individuals who belong to the same race, but who are otherwise widely separated by geographical and political boundaries, and who may have little in common with one another but the color of their skin, bears an uncomfortable resemblance to political apartheid." *Shaw v. Reno*, 509 U.S. ___, 125 L. Ed. 2d 511, 529 (1993); *see also Holder v.*

Hall, 512 U.S. ___, 129 L. Ed. 2d 687, 710-11 (1994) (Thomas, J., concurring in the judgment). The analogy to apartheid and caste systems is not novel: Three decades ago Justice Douglas argued that redistricting by racial segregation "is comparable to the Electoral Register System which Britain introduced into India." *Wright*, 376 U.S. at 63 (Douglas, J., dissenting). In that political caste system, "'[n]o one who is not a Sikh, a Muhammadan, Anglo Indian, European or an Indian Christian, is entitled to be included in a Sikh, Muhammadan, Anglo Indian, European or an Indian Christian constituency respectively.'" *Id.* at 63 n.5. This system was allegedly justifiable because, *inter alia*, "Muslims are a distinct community with additional interests of their own, which are not shared by other communities." *Id.* at 63. This sounds remarkably similar to the current justification for racial gerrymandering in America. A caste system might allow racial clans to be organized into a tribal federation, but it can never result in an indivisible nation of independent and free-thinking men and women. A. Thernstrom, WHOSE VOTES COUNT? 132 (Harvard Univ. Press 1987).

But "[t]here is no caste here. Our Constitution is color-blind, and neither knows nor tolerates classes among citizens." *Plessy*, 163 U.S. at 559 (Harlan, J., dissenting). By permitting racial segregation in redistricting, we "reinforce and preserve for future mischief the way of thinking that produced race slavery, race privilege and race hatred. In the eyes of government, we are just one race here. It is American." *Adarand Constructors, Inc. v. Pena*, 515 U.S. ___, 132 L. Ed. 2d 158, 190 (1995) (Scalia, J., concurring in part and concurring in the judgment); *United Jewish Organizations of Williamsburgh, Inc. v. Carey*, 430 U.S. 144, 187 (1977) (Burger, C.J., dissenting) (noting the retreat from the ideal of the American "melting pot"). In fact, Houston, Texas, home of challenged districts 18 and 29, has proven to be almost a model of integration. "African-American and Hispanic populations inhabit large

portions of Harris County in a checkerboard pattern with each other and with white citizens." *Vera*, 861 F. Supp. at 1339. Thus citizens of varying ethnicity in Houston live and work together just as the civil rights activists in the 1960s argued was the goal of the movement.

If integration is legally set back by dividing such integrated communities into racially gerrymandered voting districts, the cost of allowing political apartheid in our system of representative government is not academic or idle:

> There is much reason to fear the harm that it is currently doing to its supposed beneficiaries, and still more reason to fear the long-run consequences of polarizing the nation. Resentments do not accumulate indefinitely without consequences. Already there are signs of hate organizations growing in parts of the country and among more educated social classes than ever took them seriously before. As a distinguished writer has said in a different context: "It takes a match to start a fire but the match alone is not enough." Many racial policies continually add to the pile of combustible material, which only needs the right political arsonist to set it off.

T. Sowell, *Civil Rights: Rhetoric or Reality*? 117-18 (1984) (Sowell) (emphasis omitted). In light of the "ethnic cleansing" occurring in Bosnia, Rwanda, and elsewhere, and America's own tragic history of race hate, race subjugation, and race slavery, the Court should be particularly wary of acquiescing to separatist policies and disregarding the tragic potential of political segregation by saying "it could never happen here."

Finally, there is no legal justification for racial segregation in the Texas redistricting, *i.e.*, there is no

compelling state interest that would allow this racial classification to survive strict scrutiny. The only possible remedy when a governmental entity racially gerrymanders is to replace it with a race-neutral districting scheme. *United Jewish Organizations*, 430 U.S. at 186 (Burger, C.J., dissenting) (internal citation omitted). Only one governmental interest can maintain racial classifications under strict scrutiny: remedying the present effects of identified past illegal discrimination by a particular government entity. *See Adarand v. Pena*, 132 L. Ed. 2d at 188; *Wygant v. Jackson Board of Education*, 476 U.S. 267, 274-77 (1986); *Richmond v. J.A. Croson Co.*, 488 U.S. 469, 524 (1989) (Scalia, J., concurring in the judgment). This "remedy rationale" might be appropriate in the context of governmental hiring and contracting: A minority *individual* may have been denied the opportunity to compete for government employment or contracts because of his or her race and, by giving that *individual* a preference in the hiring/contracting process, an employer compensates that *individual* for a past opportunity denied.

This rationale, however, cannot square with the conditions of voting and redistricting. There are no residual losses from "bad" elections and redistricting schemes of the past: Each time a governmental entity redistricts its jurisdiction, the slate is cleaned. The fact that a previous group of legislators invidiously gerrymandered by race after a previous census has absolutely nothing to do with the present redistricting process--either the new plan is race-neutral and must be deferred to, or it segregates individuals by race and must be struck down as unconstitutional. There simply is no grey area in redistricting. By creating "majority-minority districts," or "minority influence districts," or any other form of "racial borough," "[n]o old injustice is undone, but a new injustice is inflicted." R. Bork, *The Tempting of America* 106 (The Free Press, 1990); *see also* Sowell at 119. The only constitutional

response to racial gerrymandering is to strike it down emphatically and require race-neutral redistricting in its place.

"[G]overnment has no business designing electoral districts along racial or religious lines." *Wright*, 376 U.S. at 66 (Douglas, J., dissenting). Racial gerrymandering, whether "benign" or "invidious," "threatens to carry us further from the goal of a political system in which race no longer matters--a goal that the Fourteenth and Fifteenth Amendments embody, and to which the Nation continues to aspire." *Shaw*, 125 L. Ed. 2d at 535. This Court should affirm the decision below striking down Texas' racial gerrymandering scheme and pronounce that, in the context of legislative redistricting, our Constitution is truly color-blind.

II

INCUMBENCY PROTECTION CANNOT JUSTIFY RACIAL GERRYMANDERING

The state appellants in this case argue vigorously and at length that a state may gerrymander to its heart's content if the primary reason is to assure the reelection of incumbents. State Appellants' Brief on the Merits at 5-19. This cynical view of American democracy should find no footing in this Court. Gerrymandering has been described as a "pathology of democracy." Shapiro, *Gerrymandering, Fairness, and the Supreme Court*, 33 UCLA L. Rev. 227, 239 (1985). Gerrymandering introduces a chronic, self-perpetuating skew into the business of popular representation, no matter how the term is defined. A perversion of democratic procedure, the problem resists correction by democratic means. Polsby and Popper, *The Third Criterion: Compactness as a Procedural Safeguard Against Partisan Gerrymandering*, 9 Yale L. and Pol. Rev. 301, 305 (1991) (*Third Criterion*). This Court has long recognized that

antidemocratic practices can effectively poison democratic institutions and prevent reform. Justice Clark, concurring in *Baker v. Carr*, 369 U.S. 186, 258 (1962), wrote that he would "not consider intervention by this Court into so delicate a field if there were any other relief available to the people of Tennessee" by which they could effect a reapportionment of their legislature. *See also Reynolds v. Sims*, 377 U.S. 533, 570 (1964) (lack of political remedy results in "minority stranglehold on the State Legislature").

The court below recognized that perversion of democracy which gerrymandering engenders: "The final result seems not one in which the people select their representatives, but in which the representatives have selected the people." *Vera*, 861 F. Supp. at 1334. Nonetheless, the court appeared more concerned with the degree of incumbent protection than the use of the concept in general. The court found "legitimate" the "generalized ... goal of incumbent and seniority protection" but balked at "districts ... drawn on a block-by-block or neighborhood- or town-splitting level to corral voters perceived as sympathetic to incumbents or to exclude opponents of the incumbents." *Id.*

A. American Government Is Dependent upon Voters Choosing Representatives, Not Representatives Choosing Voters

Politicians have a personal interest in preserving their incumbencies, and a political interest in perpetuating or expanding their party's political power, so they typically draw district lines in a way that serves these interests. *See generally* B. Cain, THE REAPPORTIONMENT PUZZLE (1984); B. Grofman, POLITICAL GERRYMANDERING AND THE COURTS (1990). Citizens, on the other hand, have a different interest at stake: the election of officials who will represent them effectively, an essential element of a democratic republic.

Gerrymandering violates the American constitutional tradition by conceding to legislatures the power of self-selection. Self-constitutive legislatures make no sense under a Constitution founded on the dispersion of power. Legislatures are legislatures not because *they* say they are, but because a *constitution* says they are. Of course, the Constitution does not specifically forbid gerrymandering, any more than it specifically forbids the excessive, unfair, or abusive exercise of any delegated power, but the democratic ideals embedded in the Constitution certainly forbid legislatures from insulating themselves from the popular will. U.S. Const. Art. I, § 2 ("chosen ... by the People"). The members of a partially self-constituted legislature depend to a degree upon one another rather than upon their constituents for their tenure in office. Whatever "representation" means, it cannot possibly mean that. *Third Criterion* at 304-05. As the court below noted, "the bedrock principle of self-government, the interdependency of representatives and their constituents, is thus undermined by ignoring traditional districting principles." *Vera*, 861 F. Supp. at 1334 n.43.

The Founding Fathers valued the faction-diluting character of representation by place. Rather than representation by wealth, by profession, or any other principle of organization which would define in advance the kinds of interests that would be admitted to the game of politics, the authors of the Constitution deliberately chose geographical representation. They believed this principle possessed a randomizing effect on the make-up of the voting public. *Third Criterion* at 307 n.29. Thus, for example, when Alexander Hamilton argued in the Federalist Papers that the "wealthy and the well-born"--a faction--would not come to dominate the legislature through abuse of the voting process, he asked:

> Are the wealthy and the well-born, as they are called, confined to particular spots in the

> several States? Have they, by some miraculous instinct of foresight, set apart in each of them a common place of residence? Are they only to be met with in the towns or cities? Or are they, on the contrary, scattered over the face of the country as avarice or chance may have happened to cast their own lot or that of their predecessors?

The Federalist No. 60 at 370-71 (A. Hamilton) (Rossiter, ed. 1961). A gerrymander defeats this randomizing effect by picking and choosing the factions which will exist within particular boundaries. James Madison echoed this view, particularly emphasizing the expectation that incumbents will not serve in perpetuity:

> [T]he House of Representatives is so constituted as to support in the members an habitual recollection of their dependence on the people. Before the sentiments impressed on their minds by the mode of their elevation can be effaced by the exercise of power, they will be compelled to anticipate the moment when their power is to cease, when their exercise of it is to be reviewed, and when they must descend to the level from which they were raised; there forever to remain unless a faithful discharge of their trust shall have established their title to a renewal of it.

The Federalist No. 57 at 352 (J. Madison) (Rossiter, ed. 1961).

Judicial tolerance for partisan gerrymandering contradicts the traditional American belief that government "ought to be instituted for the common benefit ... and not for the particular emolument of any single man, family, or set of men." *See, e.g.*, Pa. Const. of 1776, Art. V; Mass. Const. of 1780, Part I, Art. VII ("Government is instituted for the

Common good; for the protection, safety, prosperity and happiness of the people; and not for the profit, honor, or private interest of any one man, family, or Class of men") cited in Williams, *The Courts and Partisan Gerrymandering: Recent Cases on Legislative Reapportionment*, 18 S. Ill. U. L. J. 563, 596 (1994). The founders of our nation believed it was essential "that the members of (the legislature) may be constrained from oppression, by feeling and participating the burdens of the people, they should, at fixed periods, be reduced to a private station, return to that body from which they were originally taken, and the vacancies supplied by frequent, certain, and regular elections." *Id.* (citing Va. Const. of 1776, § 5). As President Andrew Jackson noted in his 1829 Message to Congress, "In a country where offices are created solely for the benefit of the people, no one man has any more intrinsic right to official station than another." *Id.* (citing R. Hofstader, THE AMERICAN POLITICAL TRADITION 64 (1948)).

The interdependence between legislators and constituents is furthered by communication during election campaigns and during the legislator's term of office. A gerrymandered district, which may run for miles in opposite directions, places an undue burden on the communication necessary for a legislator to represent constituents properly. On the other hand, as many states have long known, contiguity and compactness further this goal. By 1918, 25 state constitutions explicitly required that districts be composed of contiguous territory. *See* Williams, 18 S. Ill. U. L. J. at 571-72 (citing C. Kettleborough, THE STATE CONSTITUTIONS (1918)). In the other states this was not required explicitly, but districts were coextensive with existing political subdivisions, obviating the need for such a requirement. *Id.*

Prosser v. Elections Board, 793 F. Supp. 859, 863 (W.D. Wis. 1992), explained the complementary rationale for compactness.

> The objections to bizarre-looking reapportionment maps are not aesthetic .... They are based on a recognition that representative democracy cannot be achieved merely by assuring population equality across districts. To be an effective representative, a legislator must represent a district that has a reasonable homogeneity of needs and interests; otherwise the policies he supports will not represent the preferences of most of his constituents. There is some although of course not a complete correlation between geographical propinquity and community of interests, and therefore compactness and contiguity are desirable features in a redistricting plan. Compactness and contiguity also reduce travel time and costs, and therefore make it easier for candidates for the legislature to campaign for office and once elected to maintain close and continuing contact with the people they represent. Viewing legislators as agents and the electorate as their principal, we can see that compactness and contiguity reduce the "agency costs" of representative democracy.

See also Third Criterion at 339-51 (arguing in favor of a mathematical compactness standard and suggesting several models).

The Illinois Supreme Court's opinion in *Schrage v. State Board of Elections*, 430 N.E.2d 483 (Ill. 1981), demonstrates how the compactness standard serves as a check against gerrymandering. The court noted that compactness has been held to mean "closely united, territorially" and not to "require perfect compactness as in a circle or a square." *Id.* at 486. In other words, districts must be "reasonably

compact" and the courts will give some leeway. *Id.*[2] "We have, after all, a representative form of government. The creation of a representative district which is extremely elongated and not 'closely united' significantly impedes vital constituent-representative communication, thus preventing the achievement of a legislative process which is, in fact, representative." *Id.* at 488-89. Contrast this vision of compactness with Texas Congressional Districts 18 and 29 (Houston), which required an increase in the number of precincts from 672 to 1,225 to accommodate voters within the convoluted boundaries. "Polling places, ballot forms, and the number of election employees correspondingly multiplied." Voters were "thrust into new and unfamiliar precinct alignments, a few with populations as low as 20 voters." *Vera*, 861 F. Supp. at 1325.

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[2] At one time nearly every state's constitution provided for the election of legislators on a county-by-county basis, with a few in New England electing legislators from towns. *E.g.*, Ariz. Const. of 1912, Art. IV, Pt. 2, § 1 (amended 1982); Conn. Const. of 1818, Art. III, § 3 (amended 1965). See also La. Const. of 1913, Art. XVIII (providing that districts would consist of parishes or wards of the City of New Orleans). Later, most constitutions had provisions similar to one found in Colorado's 1876 constitution, which provided that "[n]o county shall be divided in the formation of a senatorial or representative district." Colo. Const. of 1876, Art. V, § 47. A few states also provided that towns, N.Y. Const. of 1938, Art. III, § 5 (amended 1991); boroughs; Pa. Const. of 1873, Art. II, § 16 (amended 1969); city wards, Pa. Const. of 1838, Art. I, § 7; precincts, Wis. Const. of 1848, Art. IV, § 4; or even city blocks, N.Y. Const. of 1894, Art. III, § 4 (amended 1991); could not be divided between districts. *See* Williams, 18 S. Ill. U. L.J. at 570.

B. The Law Does Not Support Blatant Incumbency Protection as a Legitimate Reason for Districting by Race

The majority in *Shaw v. Reno*, 125 L. Ed. 2d 511, appropriately did not base the constitutionality of racially gerrymandered districts on cases like *Washington v. Davis*, 426 U.S. 229, 239 (1976), and *Village of Arlington Heights v. Metropolitan House Development Corp.*, 429 U.S. 252, 264-65 (1977), in which this Court held that an otherwise legitimate state action that clearly has a disproportionate impact on minorities violates the Equal Protection Clause only if the legislative body undertook the challenged action for a discriminatory purpose. The *Shaw* dissenters quite correctly note that both a disproportionate impact and a discriminatory purpose are essential to such cases. *Shaw*, 125 L. Ed. 2d at 537. *Washington v. Davis* and its progeny involved challenges to legislative action that served clearly legitimate governmental interests and thus would have been unquestioned but for its impact on minorities. In *Washington*, black plaintiffs challenged the jurisdiction's use of test scores to make hiring decisions, a legitimate procedure, assuming that the test was relevant to job qualifications. In *Mobile v. Bolden*, 446 U.S. 55 (1980), the challenge was to at-large elections, at the time the most common method of electing local governments in the nation. *Id.* at 60-67.

The decision challenged in *Shaw* was of a different order. Drawing districts down interstate highways is not an otherwise legitimate action that just happens to have a racial impact. North Carolina drew the challenged district solely to have a racial impact. *Shaw*, 125 L. Ed. 2d at 521. *Shaw*'s detractors argue that creating bizarre districts is otherwise legitimate because compactness is not a requirement of state or federal law. They note that such districts are not per se unconstitutional and most states,

including North Carolina, do not require that districts be geographically compact. Like Texas in this case, gerrymanderers argue that bizarre districts are routinely created for other questionable purposes, such as protection of incumbents.

The citizens of North Carolina who set in motion the challenge that resulted in this Court's decision in *Shaw v. Reno* would surely have questioned the legitimacy of a congressional district drawn down an interstate highway, regardless of its alleged purpose. In the context of a voting district, "otherwise legitimate" must mean that it serves some recognized representational purpose other than lumping people together by race. Butler, *Affirmative Racial Gerrymandering: Fair Representation For Minorities or a Dangerous Recognition of Group Rights?* 26 RUTGERS L.J. 595, 603 (1995). That citizens are grouped by race for the purpose of "incumbent protection" rather than a "racial purpose" does not alter the analysis. Distinctions are still being made on the basis of race and need to be supported by a compelling interest.

The term "neutral principles," as used in constitutional jurisprudence, refers to value judgments having a source such as the text of the constitution, history and tradition, or "original intent," as opposed to the individual preferences of judges. *See generally* R. Bork, *Neutral Principles and Some First Amendment Problems*, 47 IND. L. J. 1 (1971). These are a source of judicial restraint and a check on judicial activism. In the redistricting sphere, "neutral principles" must be defined criteria for redistricting having sources other than legislators' individual preferences because those preferences are inherently suspect. The suspicion lies in the personal pecuniary and political interests of legislators who carry out the redistricting activity. While even the use of neutral criteria cannot be expected to result in completely "neutral redistricting"—maps which are completely devoid of bias in favor of one party—because any

given district's boundaries will almost inevitably favor one party, neutral principles ensure that such bias will only occur naturally, because of the distribution of people within a certain geographic area. Williams, 18 S. Ill. U. L.J. at 569-70.

This theme was expounded upon in *Ann Arundel County Republican Central Committee v. State Administrative Board of Elections Laws*, 781 F. Supp. 394 (D.Md. 1991), in which dissenting Judge Niemeyer concluded that the Maryland congressional map violated Article 1, Section 2, of the United States Constitution, which directs that the "House of Representatives shall be composed of Members chosen ... by the People of the several States." *Id.* at 403. Niemeyer reasoned that, because House members were to be chosen by "the People," in contrast to senators chosen by state legislators, any tinkering by a legislature intended to impose its preferences on congressional elections must be unconstitutional. *Id.* at 403-08. Niemeyer also noted that language from early United States Supreme Court decisions on gerrymandering "require[d] that representation of the people be direct and equal" (referring to *Wesberry v. Sanders*, 376 U.S. 1 (1964), *quoted in Ann Arundel*, 781 F. Supp. at 402). From this, he inferred that a legislature "must rely on available neutral criteria" when engaged in redistricting. 781 F. Supp. at 407.

Judge Niemeyer's dissent recounted the tawdry political maneuvering by incumbent congressmen to influence Maryland legislators to save their districts. *Id.* at 408-09. Niemeyer concluded that

> the driving force behind the placement of the new district boundaries was a desire to promote the election bids of certain incumbent representatives at the expense of other, less senior incumbents. The Constitution gives to the voters of Maryland a right to make their own choices about reelecting their present

> Congressmen.... The State's attempts to defeat that right by manipulating district lines, either by unnecessarily pitting incumbents against one another or by enhancing the prospects of one candidate over another, cannot be reconciled with Article I, § 2, and *Wesberry*.

Id. at 409-10.

The Court recently ruled that the popular tool of term limits cannot be employed by the voters to contradict the manipulation of the electoral process by incumbents to favor their own reelection to the Congress. *U. S. Term Limits, Inc. v. Thorton*, 514 U.S. ___, 131 L. Ed. 2d 881, 921 (1995). In this case, the Court should address the other side of that issue and rule that the reelection of incumbents is not a legitimate state interest to justify the manipulation of congressional district lines.

CONCLUSION

"The destinies of the two races in this country are indissolubly linked together, and the interests of both require that the common government of all shall not permit the seeds of race hate to be planted under the sanction of law." *Plessy*, 163 U.S. at 560-61 (Harlan, J., dissenting). Justice Harlan's words, founded on the Fourteenth Amendment and given legal credence by *Brown v. Board of Education*, required the end of segregation in buses, in schools, and in districting. Moreover, racial gerrymandering cannot be saved by a resort to the "pathology of democracy," political gerrymandering. The Court should uphold the legacy of truth in Justice Harlan's dissent and the moral

equality which forms the basis for the American political tradition by affirming the decision of the District Court for the Southern District of Texas.

DATED: October, 1995.

Respectfully submitted,

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